

No. 15059

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

PANAVIEW DOOR & WINDOW CO.,

Appellant,

vs.

REYNOLDS METALS COMPANY,

Appellee.

Appeal From the United States District Court, Southern
District of California, Central Division.

Hon. Wm. C. Mathes, Judge.

REPLY BRIEF FOR APPELLANT.

MACBETH & FORD,

THOMAS P. MAHONEY,

PATRICK H. FORD,

1709 West Eighth Street,
Los Angeles 17, California,

Attorneys for Appellant.

FILED

DEC 10 1956

PAUL P. O'BRIEN, CLERK

TOPICAL INDEX

PAGE

I.

Appellee's brief fails to point out any tenable theory to uphold the finding of no breach of contract.....	1
--	---

II.

Is it a tort in this circuit for a manufacturer to go into business on its own account using drawings conceived and submitted to it by a customer for use in making dies for extrusions ordered by the customer?.....	10
---	----

III.

"The tendency of the law is in the direction of enforcing increasingly higher standards of fairness or commercial morality in trade"	16
--	----

IV.

Appellee's motion to strike is without merit and fails to disclose prior motion below.....	18
Conclusion	19

TABLE OF AUTHORITIES CITED

CASES	PAGE
Ackerman v. Gen. Motors, 202 Fed. 642.....	13
Blankenship v. Decker, 34 Mont. 292, 85 Pac. 1035.....	9
Frank v. Wiltschek, 209 F. 2d 963.....	10, 12
Holley v. Hunt, 13 Cal. App. 2d 334, 56 P. 2d 1240.....	13
Hollywood M.P. Equipment Co. v. Furer, 16 Cal. 2d 184, 105 P. 2d 299.....	14
Laidlaw v. Marye, 133 Cal. 170, 65 Pac. 391.....	9
Pope & Talbot v. Guernsey-Westbrook Co., 159 F. 2d 139.....	7
Ramirez Co. v. Las Palmas Food Co., L.A.D.J. 11-12-56, p. 1....	16
Rio Grande Co. v. Gildersleeve, 174 U. S. 603, 43 L. Ed. 102....	18
Ross-Whitney Corp. v. Smith, Kline & French Lab., 207 F. 2d 190	16
Smith v. Dravo, 203 F. 2d 369.....	12
Sunbeam Furn. Corp. v. Sunbeam Corp., 191 F. 2d 141.....	16
Tabor v. Hoffman, 118 N. Y. 30, 23 N. E. 12.....	10
Ulmann v. Sunset-McKee Co., 221 F. 2d 128.....	7
Winfield v. Charles, 77 Cal. App. 2d 64, 175 P. 2d 516.....	16

PUBLICATION

Los Angeles Daily Journal, November 12, 1956, p. 1.....	16
---	----

STATUTE

Civil Code, Sec. 3369.....	16
----------------------------	----

TEXTBOOK

12 Lawyers' Reports Annotated (N. S.), p. 110.....	14
--	----

No. 15059
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

PANAVIEW DOOR & WINDOW CO.,

Appellant,

vs.

REYNOLDS METALS COMPANY,

Appellee.

Appeal From the United States District Court, Southern
District of California, Central Division.

Hon. Wm. C. Mathes, Judge.

REPLY BRIEF FOR APPELLANT.

I.

Appellee's Brief Fails to Point Out Any Tenable
Theory to Uphold the Finding of No Breach of
Contract.

Appellant's Brief argued that the contract between the parties was unambiguous and that both parties had regarded printed Paragraph 11 as their contract about the dies in question. Said Brief pointed out, moreover, that the trial court erred in shifting the burden of proof to appellant to explain any uncertainty which can be found in a contract drafted entirely by appellee (Brief for Appellant, Points I and II).

Appellee's Brief fails to point out any substantial evidence—or any evidence at all—to support appellee's view of Paragraph 11 of the Contract.

Appellee conceded that the dies were made “specifically” under the contract [R. 430]. Appellee cites no evidence from the record to support its view that these dies were not made *solely for appellant* under the contract.* Not one word is cited to indicate that appellee intended *ab initio* to use these dies for its own account or for any other customer.

Appellee admits that Paragraph 11 is applicable to dies for *patented* products. (Appellee’s Br. p. 59). The record here is clear that Appellee was informed from the outset that Appellant had a “Patent Pending” [R. 457-458]. Does this not make it clear that Appellee made these dies *solely* for use on Buyer’s order? For Appellee to have made the dies for any other purpose would have been pure speculation that the patent application would not be granted, or would be later abandoned, and that another customer would come along who would want the same extrusions.

Appellee pretends to cite as “evidence in the record” pages 25-27 and 32 of the transcript, being alleged “evidence” of a custom in the industry that a die charge was only for use of dies and “that the supplier was free to use the dies on anyone’s order so long as there was no interference with the original buyer’s orders” (Appellee’s Br. p. 42).**

*The Answer admitted that the dies were “necessary for the manufacture of said extrusions” [R. 10]. For what else were they “necessary”?

**In several other places, appellee also cites this alleged evidence of custom, Appellee’s Brief, page 6 (“uncontroverted evidence introduced by Appellee * * * showed it is the custom * * *”), p. 13 (“uncontroverted evidence * * * that * * * it is the custom * * *”), p. 18 (“in so doing Appellee followed the normal and customary usages of the trade”).

The plain fact is that *there was no evidence in the record as to any such custom!* The citations are to the affidavits of William O. Yates [R. 25-27] and James M. Hairston [R. 32], which did mention a custom. However, *that part of the affidavits which related to alleged customs was never received in evidence at the trial.* As Mr. Duque remarked in his closing argument:

“* * * We did not go into the custom and usage in the industry, so I will not argue that” [R. 438].

Before he offered the Yates and Harrison affidavits, appellee’s counsel also said:

“*Mr. Duque: * * * Your Honor, I also offer the affidavit of James M. Hairston * * *. So in all of the affidavits that I offer, or in any of them, any testimony with regard to the custom and usage in the trade, I would not offer and would not care to have a part of the record at this time*” [R. 292]* (Emphasis supplied).

That appellee has no excuse for overlooking or forgetting this part of the record is made clear by the fact that appellee itself cites this very page 292 on page 61 of appellee’s Brief.

A few additional comments are required with respect to appellee’s treatment of the contract count of appellant’s case. *First*, the allegation of custom in the complaint was only in the Second Count, where it was alleged that there was a custom to “keep confidential all information dis-

*Curiously this is the place in the record at which appellee abandoned, the custom-defense, after seeing the letter of its counsel, Mr. Galea [R. 55-56], which it now seeks to strike as “not offered or received in evidence at the trial.” (Appellee’s Br. p. 2.)

closed * * * by * * * customers * * * in blueprint form” and to “use dies paid for by one customer only for that customer’s order” [R. 6-7]. This custom was independent of contract and was not incorporated in the first count of the complaint [R. 3-5]. At the trial, appellant made no attempt to prove this allegation, inasmuch as it was regarded as surplusage in view of the cases cited in Appellant’s Opening Brief (pp. 26-34). Appellee’s argument that this change on the theory of the Second Count in some way weakened or rebutted the first count is very tenuous (Appellee’s Br. pp. 41-42).*

Second, appellee argues that there is a silent and invisible “If” in Paragraph 11 of the contract, and that the clause purporting to apply to “any” dies really applied only to “some” dies (Appellee’s Br. p. 42 *et seq.*). *No attempt is made to answer appellant’s argument that Paragraph 11 necessarily applies to any die for which a die charge is made, inasmuch as it is the only part of the contract providing for Buyer to pay die charges* (Brief for Appellant, pp. 10-15). No witness testified that Paragraph 11 should have had an “if” in it.

Third, appellee argues that appellant’s evidence substantiated the trial court’s interpretation of Paragraph 11, and then cites Exhibit 5, which it strangely argues is not binding on appellee because it was a contract with a sepa-

*Appellee’s argument fallaciously assumes that the custom alleged by plaintiff was the opposite of the custom alleged by defendant. Actually, defendant alleged a custom as to the *meaning* of the contract on die use and die charges. Plaintiff alleged a custom on die use—independent of contract.

rate corporation (Appellee's Br. p. 45).^{*} While it might be fairly argued that the two distinct corporate entities involved in some way weakened appellant's theory, it can hardly be turned into proof that this contract had a meaning opposite to the meaning which appellant was led to understand. The surrounding circumstances included the contracts theretofore in use by appellee, with a corresponding die-clause. Appellant's point is that such prior corresponding die paragraph

(1) tends to show that Paragraph 11 is applicable to the dies in question, and

(2) tends to show that the slight change in language was not intended to change the meaning.

The important point is that anyone who had done business with appellee on the old form of contract would be led to believe he was still protected, when the switch was made to the new form. This argument is ignored by appellee's Brief (see Brief for Appellant, pp. 22-33).

Fourth, in answer to the dilemma which appellant proposed—that a buyer of extrusions who also pays a “die charge price” is *outright owner* of the dies, unless Paragraph 11 is applicable [R. 44, 406-408, 444, 447]—appellee cites the “evidence” of custom, which is above shown to be not part of this record! (Appellee's Br. p. 47.) Next, appellee cites the price differential: \$1430 paid *versus* \$3176 cost. Of course, there are two short answers: (1) appellant was charged for only one set

^{*}The other corporation had the same address and management, as Appellant [R. 94, 107, 224]. Appellee offered evidence at the trial regarding credit extended to the *other* corporation, showing that appellee regarded the two businesses as inter-locking [R. 12-16, 291; *Cf.* Appellee's Br. p. 8 for similar reference].

of dies on the order [R. 254-255], and (2) as Judge Mathes wisely remarked:

“The Court: I assume that their answer to that is that it is your business what you charged them * * *” [R. 440].

Whether appellee gained or lost on the transaction could only be determined by examination of the entire order, including the extrusions [R. 254-255]. Whether the price quoted on the nine dies was high or low is of no significance, standing alone—*except that appellee obviously led appellant to believe that the \$1430 die charges had reference to Paragraph 11 which was the sole “term and condition” providing for “die charges!”*

Fifth, appellee dares to argue that *appellant ordered only extrusions not dies!* (Appellee’s Br. p. 12.) This argument ignores the Findings *drafted* by appellee’s own counsel:

“It is true that * * * plaintiff placed with defendant * * * orders for the manufacture by defendant of *extrusion dies* * * *” (Emphasis supplied) [R. 58, par. II].

It also ignores Exhibit 21, produced by appellee on subpoena, being the file copy of appellee of the original order for the *nine dies!* [R. 254-255.]

Appellee’s Brief makes no reference to this evidence, nor to said Finding.

Sixth, appellee attempts no reply to appellant’s argument that Paragraph 11 is meaningless if it is not applicable to these dies, and that to make the contract reasonable it is necessary to follow the established statutory and case-law and construe the contract as a whole “to give a

sensible meaning and effect to all its provisions" (Brief for Appellant, pp. 10-15).

To the cases cited in the opening brief, appellant now desires to add *Ulmann v. Sunset-McKee Co.* (9th Cir., 1955), 221 F. 2d 128, which shows that this Court will review the construction by the trial court, and that the promisee "should have the advantage of * * * language which is susceptible of two intrinsically reasonable but opposite constructions." Also, the case of *Pope & Talbot v. Guernsey-Westbrook Co.* (9th Cir., 1947), 159 F. 2d 139, which illustrates the practice of construing the "Terms and Conditions" on the reverse side of an acceptance to apply to the matters contracted on the face thereof. The Court said:

"The freight clause must be construed as a whole. Appellant's contention would make meaningless the later words 'after loading' * * * It is without merit."

Seventh, what does appellee reply to our argument that it was judicially admitted, in divers ways, that Paragraph 11 was applicable to the dies here involved? Appellee argues that the admission was a conditional one, that "if applicable" Paragraph 11 was no help to plaintiff. No doubt such inconsistent arguments was also made by appellee, but the places cited by appellant are not subject to such interpretation. In the places cited in the Brief for Appellant, there is no question at all that appellee was claiming Paragraph 11 to be applicable (Brief for Appellants, pp. 17-19). Appellee's argument that

"Appellant has not deemed it necessary to state fully appellee's contentions, apparently with the hope that appellee also would not" (Appellee's Br. p. 59)

is worse than no reply at all, because it points to no inaccuracy in any of the direct quotations in the Brief for Appellant—and thereby is in effect a confession that the quotations are accurate and not out of context. The contention that appellee's "full argument" was broader in scope is *a mere confession that their defense did shift* [Cf. R. 432-433].

Appellee also attempts to "distinguish" its admissions by pointing out (at p. 60 of its Brief) that it never admitted appellant's interpretation of Paragraph 11. *Of course, the admission was merely that Paragraph 11 was applicable.* That being established, the sole question is what does Paragraph 11 mean? The point, which appellee misses, is that the *admission* of applicability is inconsistent with the Conclusion of Law that appellant had failed to sustain the burden of proving applicability of Paragraph 11 [R. 60, Concl. of Law No. I]. As far as the *meaning* of the clause is concerned, even appellee's Brief is frank enough to admit that the clause *means* the dies will not be used except for the one who pays the die charge—but the Brief attempts to limit the *applicability* of the clause to "classified or secret military products or highly specialized, technical, or unique equipment" [Appellee's Br. p. 6, citing R. 25-27, the affidavit of Mr. Yates' stating such to be the meaning "by custom and usage" of Paragraph 11 of the terms and conditions," which as shown *supra* is *not* in evidence, R. 292].

Eighth, appellee does not deal at all with the problem of whether the trial court committed reversible error in holding that appellant had the burden of proof by a preponderance of the evidence as to any ambiguity or uncertainty in the contract, drafted by appellee [see Concl.

of Law I, R. 60]. It is difficult to locate a case in point on burden of proof under the parol evidence rule, because such matters are generally determined by a court, without a jury, on conflicting evidence, in which case the point is not reviewed on appeal, since the trial court has made no express ruling as to who had the "burden of proof." Here, however, the Court used the "burden of proof" thesis as its rationale, and appellant has now found a case in point under a statute similar to the California Code. The case is *Blankenship v. Decker* (1906), 34 Mont. 292, 85 Pac. 1035, which reversed a jury verdict because of an error in instructions. The Court said:

"* * * no greater burden rests upon the promisor [who drafted the contract] than to show by a preponderance of the evidence that the promisee understood it as he (the promisor) believed he understood it. He is not required to show by a preponderance of the evidence what the promisee in fact understood."

The California Supreme Court, in *Laidlaw v. Marye* (1901), 133 Cal. 170, 179, 65 Pac. 391, reversed a finding and judgment in favor of an assignee of the draftsman of a contract, on the ground that, if the contract were regarded as ambiguous, there was no evidence to support a finding in favor of the party who drafted the agreement. Although this case fails to use the terminology of "burden of proof," it seems that the implication was that the draftsman or his assignee had the burden, otherwise a finding in his favor, without evidence, would not be prejudicial error. This case may therefore, be regarded as close, if not exactly in point.

II.

Is It a Tort in This Circuit for a Manufacturer to Go Into Business on Its Own Account Using Drawings Conceived and Submitted to It by a Customer for Use in Making Dies for Extrusions Ordered by the Customer?

Appellee states that the rule of *Tabor v. Hoffman*, 118 N. Y. 30, 23 N. E. 12 and *Frank v. Wiltschek*, 209 F. 2d 963 (Appellee's Br. p. 71), assumes that the production information is not revealed to the public by the product. Appellant is in complete accord with this position, and it was established as a matter of judicial notice that the use of appellant's door as the sole source of information would have entailed delay, expense, and labor. [R. 132-134.] At the trial appellee did not contend that public sale of the product revealed the secrecy of the drawings. Indeed, appellee contended the drawings were still secret.*

Appellant's argument on the establishment of a legally protected interest in the extrusion drawings of the Panador which appellant submitted to appellee is not adequately answered in appellee's Brief.

*"Mr. Duque. * * * *There is no evidence in the record that we have ever breached any trust or breached any confidence or have shown any drawings or shown to Windsor any drawings or extrusions or anything else that we were not supposed to have shown*" [R. 284, emphasis supplied]. Again: "Mr. Duque: If the court please, there is no evidence in the record that we misused his drawings. * * * That plaintiff used the die tools to produce extrusion for Windsor. But we never misappropriated the drawings. We never disclosed them to anybody else. * * *" [R. 437.] Cf. Hairston Affidavit, R. 33, to same effect.

There is a well recognized tort which consists in the misuse of such drawings by one business concern, which deals at arms length with the originator of the drawings—in spite of the lack of any fiduciary or trust relationship in the strict equity sense. The tort occurs even if there is nothing unique about the drawings and even if all the information therein was in the public domain prior to its submission.

The cases which establish this tort are discussed fully in Points III to VI of the Brief for Appellant (pp. 25, 50, 36).

Appellee's Brief cites and attempts to answer only a few of these cases.

Appellee has failed to controvert appellant's position that appellee wrongfully and wilfully misappropriated appellant's trade secret in appellant's extrusion drawings for the Panador.

Appellee admits that the drawings were appellant's creation. It is admitted that the drawings were submitted to appellee to make die drawings therefrom. Therefore, these new and original drawings, previously known only to appellant, were a trade secret which was communicated to appellee.

Appellee admits it made die drawings from appellant's drawings and then made dies from the die drawings. Appellee then misused the dies for its own gain to appellant's great harm.

The trial court recognized that unless appellant had been in possession of appellee's secret it could not have entered the field so expeditiously as it did [R. 132-134].

Thus possession of the secret imparted to it by appellant enabled appellee to betray the trust reposed in it by appellant, without expense, delay, and labor, because it necessarily used the drawings given to it by appellant to make the dies used to compete with appellant.

Appellee in its argument assumes that it is in the same position as the public so far as information revealed by the door itself as concerned. This is not so since appellee was prevented by its relationship with appellant from using information which might be freely used by the public if available to public.

Frank v. Wiltschek (2d Cir., 1953), 209 F. 2d 493.

And even if it were true that appellant could do what any third party could do, *i.e.*, copy this Panador, appellant did not limit itself to making new dies experimentally from study of extrusions bought on the open market. It used the dies made from the drawings submitted by appellant [see Stipulation, Ex. 1; R. 40-41].

Appellee takes the position in its brief that there is substantial evidence to support a finding that appellant's drawings were not unique and disclosed only ideas already in the public domain. Assuming, without conceding, that there was any such evidence or finding, it is submitted that appellee's position remains untenable—because the cases cited show that even such drawings, submitted for a business reason, cannot be used by the submittee without its being liable in an *ex delicto* action. For example, in *Smith v. Dravo* (7th Cir., 1953), 203 F. 2d 369, the defendant used plaintiff's information and blueprints in designing its own container device, the plaintiff having

submitted the blueprints to defendant solely to enable defendant to appraise the design with a view to purchase of plaintiff's business. A judgment for defendant was *reversed*, even though the container itself had already been on the market and some of the construction details were in the public domain.

Likewise, in *Ackerman v. Gen. Motors* (4th Cir., 1953), 202 F. 2d 642, in an opinion by Parker, C. J., a defense judgment was *reversed*, the plaintiff being held entitled to damages from the date he disclosed the details of his unpatented design to defendant, while a patent was pending, the defendant having used the design to draft its own similar product. That such a tort exists under California law seems clear from *Holley v. Hunt* (1936), 13 Cal. App. 2d 334, 336, 56 P. 2d 1240, where defendant operated a job shop and made unpatented articles for plaintiff. Defendant started to make the device for his own benefit, and an injunction followed, which was affirmed on appeal. As the Court said:

"Basically, respondent asked protection from injury by fraudulent means, to wit, the use by appellants of trade secrets gained in a confidential relationship, and injunction is a proper remedy (*Vulcan etc. Co. v. American Can Co.*, 72 N. J. Eq. 387, 67 Atl. 339, 12 L. R. A. (N. S.) 102)."

The latter case has some apt language which points up the weakness of appellee's position here, to wit:

"To this the trustee might indeed answer: 'It is true that I agreed to keep your secret from others; but I did not agree that I would not myself make use of it in competition with you.' But it is not

likely that a court of equity would regard such answer as in any way ingenuous or exculpatory.” (12 L. R. A. (N. S.) at 110.)

There is no question, in the instant case, that appellant made an “original drawing” [R. 96] and “reduced [it] to blueprint form and submitted [it] to defendant in that form” [Findings V, R. 59]. It is appellant’s position that this was a bailment of the drawing, as a matter of law.

When appellee used this drawing for its own benefit, there is no question that it violated the recognized law of California. As Mr. Justice Moore said for a unanimous California Supreme Court, in the case of *Hollywood Motion Picture Equip. Co. v. Furer* (1940), 16 Cal. 2d 184, 188-189, 105 P. 2d 299:

“A further ground urged to establish the insufficiency of the complaint is that the complaint does not allege that plaintiff’s invention was a secret invention or allege facts from which such secrecy can be determined. Said statement is true but upon the facts alleged plaintiff is not required to rely upon the secrecy of its invention. We have here a relationship created by a contract where the manufacturer took into his custody certain patterns created by the inventor for the purpose of manufacturing castings from them for the inventor. *Defendant did not acknowledge the dominance of a fundamental precept of honesty and fair dealing, enjoined by the Decalogue and supported by prevailing moral concepts. ‘Thou shalt not steal’ applies with equal force and propriety to the industrialist of a complex civilization as to the simple herdsman of ancient Israel.* Where a bailee of an article has accepted it under definite

terms to hold it and to use it for the benefit of the bailor, a confidence has been reposed which should remain inviolate. *The mere fact that the ingenious principle materialized in the thing bailed may be known to all the world would not depreciate the sanctity of the contract* between the bailor and the bailee. When a former employee of the Dupont Fabrikoid Company undertook to manufacture leather by use of alleged secret processes learned while in the company's employ, it was held that 'a starting point is not property or due process of law but that the defendant stood in confidential relations with the plaintiffs or one of them.' Continuing, Justice Holmes said: 'Whether the plaintiffs have any valuable secret or not, the defendant knows the facts, whatever they are, through a special confidence that he accepted. The property may be denied, but the confidence cannot be . . . The first thing to be made sure of is that the defendant shall not fraudulently abuse the trust reposed in him. It is the usual incident of confidential relations. If there is any disadvantage in the fact that he knew the plaintiffs' secrets, he must take the burden with the good.' (*E. I. DuPont De Nemours Powder Co. v. Masland*, 244 U. S. 100 [37 Sup. Ct. 575, 61 L. Ed. 1016].) While the inventor of any product of the mind may forfeit his ownership thereof when it becomes known to the public (Civ. Code, sec. 980), yet such forfeiture does not deprive the author of his right to make contracts with reference to his product. Neither does he yield his right to have such contracts protected by the courts where a confidential relationship has been created on the basis of the inventor's secret (*Hamilton Mfg. Co. v. Tubbs Mfg. Co.*, 217 Fed. 401, 407)." (Emphasis supplied).

III.

“The Tendency of the Law Is in the Direction of Enforcing Increasingly Higher Standards of Fairness or Commercial Morality in Trade.”

The above caption is a quotation from the opinion of the Hon. Wm. C. Mathes, in the recent case of *Ramirez Co. v. Las Palmas Food Co.* (U. S. D. C., So. Cal., 19355-WM), reported in L. A. Daily Journal, November 12, 1956, page 1, citing *Ross-Whitney Corp. v. Smith, Kline & French Lab.* (9th Cir., 1953), 207 F. 2d 190, 196.

Appellee's brief regards California Civil Code Section 3369 as limiting unfair competition to “palming off” or “secondary meaning.”

However, the trade-name and trade-mark cases show that protection against “unfair competition” will be granted even where the defendant is not in competition in any way with plaintiff.

Sunbeam Furn. Corp. v. Sunbeam Corp. (9th Cir., 1951), 191 F. 2d 141;

Winfield v. Charles (1946), 77 Cal. App. 2d 64, 70, 175 P. 2d 516 (“Emphasis should be placed on the word ‘unfair’ rather the ‘competition’.”)

Appellee's definition of unfair competition necessitates competition between the parties and deception of the public.

However, there is an increasing tendency on the part of the courts to extend the law of unfair competition to acts of business piracy such as those performed by appellee in violating the rights of appellant.

Appellee espouses the law of the jungle in the world of business, but the increasing standards of morality enforced by the courts will not permit flagrantly predatory tactics such as those of appellee.

Although there may not have been “direct trade competition” in the old sense, there was obvious *economic competition*, in that Windsor had only two possible sources of supply:

- (1) Appellant, or
- (2) Appellee.

Appellant would supply the doors in a package. Appellee would supply extrusions and Windsor would do its own packaging [Ex. 14; R. 199-207].

It is submitted that it is time for our courts to recognize that economic competition exists between parties in the position of appellant and appellee, and that appellee’s unfair use of appellant’s drawings, and of the dies made therefrom, for which appellant paid a substantial “die charge price” of \$1430 [R. 40] is a tort.

This competitive interest is as worthy of protection as the noncompetitive interest in protection of a trademark. The tort is independent of “contract.”

IV.

Appellee's Motion to Strike Is Without Merit and Fails to Disclose Prior Motion Below.

Appellee has included in its brief two motions to strike:

First, a motion to strike a portion of appellant's objections to the Findings on the ground that it "was not offered or received in evidence at the trial" (Appellee's Br. p. 2).

Second, Exhibit 14, found at R. 198-207.

PRIOR MOTION.

Appellee neglected to inform this Court that it made a prior motion to strike the first item in the trial court, which was denied without prejudice.

Appellee neglected to inform this court that the trial court had the benefit of affidavits from both sides as to the item sought to be stricken.

Appellee neglects to dispute in any way the genuineness of the item, its obvious inconsistency with appellee's present position as to the applicability and meaning of the contract here involved, and the cogency of the lawyer's reasoning in the letter.

Appellee neglects to inform this court that appellant cited Points and Authorities below to establish the propriety of including a letter in the record which was not part of the evidence (*Rio Grande Co. v. Gildersleeve* (1899), 174 U. S. 603, 43 L. Ed. 102, refusing to strike a letter).

EXHIBIT 14.

Exhibit 14 is attacked as not being in evidence.

Appellee neglected to inform the court that the Exhibit was designated for this record by appellee, not by appellant.* The exhibit was not cited in the Brief for Appellant, but its mere perusal by the Court will show why appellee is so anxious to strike it out—it is inconsistent with the affidavits, used by appellee to oppose a preliminary injunction in this case.

Conclusion.

Appellee seeks to support the findings and judgment chiefly by reliance on the “evidence” of custom which was not even introduced at the trial. This strongly argues that appellee can find no real support in the record for its position and for the trial court’s decision and rationale.

Appellee’s Brief has conceded that Paragraph 11 prevents it from using any dies to which it applied, but claims that it is not applicable to the dies made “specifically” for appellant, without independent parol evidence that the dies were made “solely” for appellant. Judicial admissions in the trial court establish beyond cavil that Paragraph 11 was applicable to these dies, and the language of the contract, construed as a whole, likewise makes “applicability” clear. Appellee’s conduct, therefore, was a clear breach of contract, and the Findings and Conclusions of Law were in serious and prejudicial error.

*Appellee will no doubt admit this fact, as the Designation and Counter-designation will be found on pages 64 and 70 of the Transcript of Record docketed in this appeal on March 9, 1956.

Appellee tortiously used appellant's original drawings by using dies constructed therefrom for its own account to enable it to sell extrusions to a customer with whom appellant had refused to deal further unless the outstanding account was paid. Thus, appellee entered into economic competition with appellant, since the customer had a choice of buying only from appellant or appellee. This competition, using appellant's design drawings, was unfair and a tortious misuse of the drawings.

The judgment should be reversed.

THOMAS P. MAHONEY, and
MACBETH & FORD,

Attorneys for Appellant.